No. 8120.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
ONTARIO CANNING CO., INC., a corporation,
Debtor.

Weisstein Bros. & Survol, a California corporation,
Appellant,

vs.

Hubert F. Laugharn, Trustee in Bankruptcy of Ontario Canning Co., Inc., Debtor,
Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
APR 1 - 1936

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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THE QUESTION FOR DECISION.

Where the evidence introduced at a hearing before a Referee in Bankruptcy supports the Referee's findings, decision and order, is it not error for the District Court on review to reverse the decision and order of the Referee?

STATEMENT OF THE CASE.

This appeal is presented upon an agreed statement of the case, pursuant to Equity Rule Number 77.

The pertinent matter under consideration is comprehended within the following facts:

Appellant operated a retail grocery store in Los Angeles. The Ontario Canning Co. operated a canning business. In August, 1934, appellant purchased 353 cases of berries from the Canning Company, paying the full purchase price therefore at the time of the purchase, and it was agreed that the berries would be delivered to the buyer at such times and in such amounts as would meet the convenience or requirements of the buyer.

At and prior to the time of such purchase, the Canning Company operated its business in a certain building in which the Lawrence Warehouse Company was also a tenant, and the finished products of the Canning Company were stored in the portion of the building occupied by the Warehouse Company.

From time to time, according to appellant's requirements, it called for and received some of the cases of berries so purchased and received in installment deliveries an aggregate of 100 cases, the balance of 253 cases remaining in the warehouse in stacks, each stack being marked with a card bearing the words "Sold to Weisstein Bros. & Survol".

After claimant obtained the delivery of 100 cases, it called for and demanded the balance of 253 cases, but claimant was unable to obtain possession of or procure the release or surrender of any of said 253 cases.

At the time of said purchase, claimant had no information respecting any arrangements between the Canning Company and the Warehouse Company and had no information respecting any arrangements between the Canning Company and its bank. Without the knowledge of claimant, all of the stock of the Canning Company had been previously pledged by the Canning Company to its bank, and the merchandise had been deposited in the warehouse by the Canning Company under such pledge.

After the sale to claimant and after the delivery of 100 cases to claimant, the Canning Company filed its petition under 77-B of the Bankruptcy Act, and subsequent to such filing, claimant was advised of the pledge arrangement above recited.

In the course of the administration of the bankrupt estate, the Trustee offered the assets of said estate (including its interest in the canned goods), for sale, whereupon claimant objected to the sale, maintaining that the 253 cases of berries were the property of claimant under its purchase and payment,—and as a result of claimant's objections and in order to permit the Trustee to complete its sale of the assets of the bankrupt estate without further opposition, a stipulation was made between the Trustee and the claimant [pages 4 to 7 of the Record], the substance of which was that if the claimant could establish at a hearing before a Referee in Bankruptcy that at the date of the filing of the bankruptcy petition claimant was the

owner and entitled to the possession of the 253 cases of berries, and that said merchandise came into the possession of the Trustee or that said merchandise had been theretofore or thereafter placed in the warehouse operated by the Lawrence Warehouse Company, and that the Trustee or claimant was entitled to recover possession, then and in either of such events, the Trustee would pay to the claimant out of the proceeds of the sale of the assets of the debtor, in full payment of the claimant's demands against the Canning Company and its Trustee, the sum of $1366.20 in cash, such sum being the agreed then value of the 253 cases, such sum of $1366.20 to be impounded pending the determination of the matter by the Referee.

Thereafter, a hearing was had before the Referee at which claimant introduced evidence, oral and documentary, establishing without controversy, conflict or dispute, its purchase of said berries, its payment therefor, and its right to the possession thereof; and the debtor corporation presented no testimony in opposition. The proofs further show that the failure of the Canning Company to release the 253 cases and its inability to surrender said 253 cases to claimant, were not due to any fault of the claimant or any arrangement between the Canning Company and the claimant,—but were due solely to the nature of the private transactions between the Canning Company and the bank, of which the claimant had no knowledge.

After such hearing, the Referee made his written findings and decision [pages 8 and 9 of the Record], expressly finding that the claimant established that as of the date of the filing of the debtor's petition in bankruptcy, claimant was the owner of and entitled to the possession of the 253 cases of berries, that said merchandise had been placed by the debtor in a warehouse operated by the Lawrance Warehouse Company and that claimant was entitled to recover possession thereof; and the Referee thereupon ordered the payment to claimant of the impounded sum of $1366.20.

Upon a hearing, based upon a petition for review prosecuted by the bankrupt, the District Court reversed the order of the Referee [pages 9 and 10 of the Record], and made an order [pages 14 and 15 of the Record] setting aside and annulling the order of the Referee, and allowed the claimant a general claim for $962.04.

ASSIGNMENT OF ERRORS.

At pages 18 and 19 of the Record, the appellant's Assignment of Errors is set forth in full. The three assignments are:

"First Assignment of Error.

"Said Court erred in reversing, annulling, setting aside and in any manner disturbing the order of the Referee in Bankruptcy, which order of the Referee bears date June 11th, 1935, and by which order of the Referee, the Trustee of the above bankrupt estate

was ordered and directed to pay to the appellant and claimant herein, Weisstein Bros. & Survol, a corporation, the sum of $1366.20 in cash, out of the cash assets of said estate.

"SECOND ASSIGNMENT OF ERROR.

"Said Court erred in reversing, setting aside, annulling and in any manner disturbing the order of the Referee in Bankruptcy in said matter wherein by said order of the Referee dated June 11th, 1935, it was found and determined that the undersigned appellant and claimant, Weisstein Bros. & Survol, a corporation, was entitled to have, recover and receive of and from the Trustee of said bankrupt estate the sum of $1366.20 out of the cash assets of said estate.

"THIRD ASSIGNMENT OF ERROR.

"Said Court erred in making its order dated November 30th, 1935, and entered on the 3rd day of December, 1935, wherein by said order it was adjudged and decreed that the undersigned appellant and claimant, Weisstein Bros. & Survol, is a general creditor of said bankrupt estate in the sum of $962.04."

APPELLANT'S CONTENTIONS.

Appellant respectfully maintains that on the record there was no basis upon which the District Court could disturb the Referee's decision and order; and that the District Court committed reversible error in annulling and setting aside the order of the Referee.

ARGUMENT.

(1) The Law.

Appellant submits that inasmuch as the decision of the Referee was predicated upon ample and sufficient evidence to sustain and justify the decision and order, the Referee's order should not have been disturbed by the District Court; and that accepting the applicable rule that the Referee's order is to have the presumption of correctness in its favor and that the Referee's findings are to have the same presumption, and that only manifest error will justify reversal on the facts, the District Court committed error in annulling such order of the Referee.

Gordon v. Gelberg, 69 F. (2d) 81, at p. 83 (1); C. C. A. 2nd;

Rasmussen v. Gresly, 77 F. (2d) 252; C. C. A. 8th;

Remington on Bankruptcy, 4th Edition, Volume 8, Section 3669, page 41.

In *Rasmussen v. Gresley* (*supra*), the Court said:

> "The determination of a referee in bankruptcy of issues of fact, based upon the evidence of witnesses appearing in person before him, where such determination must rest upon the credibility of the witnesses and the weight of their evidence, should ordinarily be accepted upon review, except in those cases where it is obvious that the referee has made a mistake."

(2) Analysis of District Court's Decision.

[Pages 9 and 10 of the Record.]

The District Court expressly found that as between the claimant and the Canning Company, claimant "had bought and paid for the goods and title passed". It is appellant's claim that these were the precise matters to be determined under the stipulation, and that the findings on these points in claimant's favor necessarily impelled a decision favorable to appellant. The very purpose of the stipulation was to obtain a judicial determination of those very facts, for the precise purpose of determining *who, as between the bankrupt estate and claimant*, was entitled to receive the impounded sum of $1366.20.

After finding entirely in favor of appellant on the facts, the District Court concluded "claimant is not aided by the stipulation", entirely failing to recognize that the *existence* of the facts in appellant's favor *entitled appellant* to the impounded funds *under the stipulation.* The District Court explained the last quoted statement by stating that the question of the right of possession "could not be litigated except where the bank is a party"—but the District Court thereby failed to recognize the fact that the Trustee and claimant had voluntarily stipulated *between themselves* the manner in which the right to the impounded funds should be determined—and inasmuch as the stipulation had the express approval of the District Court ("The foregoing stipulation is entered into pursuant to the approval thereof given by the Honorable George Cosgrave,

Judge" [page 7 of the Record]), the parties had the right to stipulate the manner in which the question should be determined, and the stipulation expressly provides for the determination of such question *at a hearing between the parties* to the stipulation; and this fact is borne out by the Referee's decision which recites: "The meeting then proceeded to hearing claim of Weisstein Bros. & Survol, on behalf of Hubert F. Laugharn as Trustee of the bankrupt estate and Weisstein Bros. & Survol by their counsel, and evidence both oral and documentary having been submitted" [page 8 of the Record].

Manifestly, the claimant having paid for 353 cases of berries, and having received 100 cases, was entitled to "the right of possession" of the 253 cases as effectively as it was entitled to "the right of possession" of the 100 cases delivered to and received by it.

As illustrative further of the patent error of the District Court, notwithstanding the fact that the stipulation fixed the value of the 253 cases at $1366.20 and notwithstanding the fact that no evidence of any kind was offered at the hearing to repudiate such values or to fix any other value, the District Court *in the total absence of any basis for its act,* fixed the value of the 253 cases at $962.04. This matter is covered by appellant's third assignment of error and it is specifically called to this Honorable Court's attention at this time, *not* for the purpose of establishing appellant's claim as a *general* creditor in any amount, but for the limited purpose of indicating the lack of justification or basis for the disturbance of the Referee's decision.

Conclusion.

Appellant respectfully submits that the decision and order of the Referee should be reinstated and restored; that it should be decreed that appellant is entitled to the sum of $1366.20 in cash; and that the order of the District Court should be reversed.

Respectfully submitted:

Jules C. Goldstone and
David A. Sondel,
Solicitors and Attorneys for Appellant.